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CHESTER JENKINS (MSHA) V. HECLA-DAY MINES  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
WASHINGTON, D.C. 20006  
AUGUST 26, 1984

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)                      Docket No. WEST 81-323-DM

on behalf of CHESTER "SAM"  
JENKINS

v.

HECLA-DAY MINES CORPORATION

DECISION

This case involves a complaint of discrimination filed by the Secretary of Labor with this independent Commission pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982). The complaint alleged that the operator violated section 105(c)(1) of the Mine Act, 30 U.S.C. 815(c)(1) in connection with three incidents involving the complaining miner, Chester "Sam" Jenkins: (1) the posting on the mine bulletin board of a letter that Jenkins had written; (2) the failure to reassign Jenkins to work on a particular stope; and (3) the suspension of Jenkins without pay. A Commission administrative law judge dismissed the complaint in its entirety. 5 FMSHRC 489 (March 1983)(ALJ). We subsequently granted petitions for discretionary review filed by both Jenkins and the Secretary of Labor and heard oral argument. We affirm the judge in part and reverse in part. We conclude that the suspension of Jenkins without pay violated the Mine Act, and remand so that the judge may make an appropriate back pay award.

I.

In the middle of 1979, Jenkins began working for Day Mines at its Republic Unit Mine, a gold and silver mine located near Republic,

Washington. Day Mines operated the Republic Unit Mine during the relevant time period although Hecla-Day Mines Corporation ("Hecla-Day") took over Day Mines before the case came to trial. The Republic Unit Mine is a contract mine worked by pairs of miners assigned to stopes, and Jenkins was a contract miner. Stopes are excavations from which ore is mined in a series of cuts called steps. After completion of a mining cycle that involves drilling, blasting, and removal of muck, miners are transferred to another area while the mined area is "back-filled" with sand. Thereafter, another mining cycle may be initiated in the stope.

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Contract miners at the Republic Unit Mine are paid an hourly wage plus a fee for each cubic foot of rock broken. The fees depend upon the nature of the stopes. Smaller stopes are more difficult to mine and are assigned a higher fee rate. Jenkins testified that despite the pay difference, miners made more money working in larger stopes. Ron Short, the manager of the Republic Unit Mine and responsible for setting the incentive rates in the stopes, testified that miners made more money in the smaller stopes.

On December 11, 1980, Jenkins finished a mining cycle in stope 4114, in which he had previously completed another mining cycle. On December 12, 1980, Jenkins and his partner, Don Vilardi, were assigned to work in stope 4222. Stope 4222 was a smaller stope than stope 4114 and therefore had a higher fee rate per cubic foot of rock broken.

On December 24, 1980, a miner died in an accident at the Republic Unit Mine. Concerned by the accident, on the following day Jenkins prepared a four-page letter to Keith Droste, the general manager, and W. M. Calhoun, the president of Day Mines. The letter described several alleged safety problems at the mine, including misconduct on the part of some miners. Jenkins did not immediately mail the letter. He later added to the letter a postscript signed by four other miners who stated their agreement with Jenkins. On December 29, 1980, the first working day following the fatality, a safety meeting was called by management of the mine. At that meeting Jenkins raised several of the same complaints regarding safety that he had included in his letter. Jenkins later mailed his letter, dated December 25, 1980, to Calhoun and Droste. Pet. Exh. 1. Droste responded to each of Jenkins' complaints in a letter that was received by Jenkins on January 14, 1981. Res. Exh. 2.

On December 30, 1980, Jenkins put a notice on the mine bulletin board requesting nominations for a mine safety committee. This notice upset William Hamilton, the mine superintendent. The letter was quickly removed from the board. On January 2, 1981, Jenkins circulated a petition among fellow miners concerning a cut-off of power to the main hoist on December 24, 1980, the day of the fatal accident. The power had been turned off for three hours, creating what Jenkins considered a safety problem. Jenkins had mentioned this problem in his December 25 letter and at the safety meeting on December 29, 1980. Forty-four miners signed Jenkins' petition concerning the cut-off of power. On January 7, 1981, the petition was delivered to mine superintendent Hamilton.

On January 7, 1981, Ron Short, the mine manager, spoke with

Jenkins and his partner Vilardi in the mine office. Several times Short asked whether Jenkins and Vilardi, who had also signed Jenkins' December 25 letter, had any objection to the posting of the letter on the mine bulletin board. Neither Jenkins nor Vilardi objected, and Short posted the letter. After the posting of the letter, a miner threatened Jenkins with bodily harm. Another miner, David Hamilton, the son of the mine superintendent, accused Jenkins, in the presence of others, of being an agitator and troublemaker. The following day, a threat was made to Jenkins' 7-year old son while he was at school.

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Following these threats Jenkins did not go to work on January 8, 1981, but instead consulted an attorney. On her advice, he went to the local sheriff's office to file a complaint. Jenkins' wife telephoned the mine and informed mine personnel of the threats against her husband and son. On January 9, 1981, Ron Short telephoned Jenkins and told him that if he returned to work, Short would guarantee his safety while on company property. Jenkins had made an appointment to speak with a mine inspector from the Department of Labor's Mine Safety and Health Administration (MSHA) in Spokane, Washington, to discuss the events at the mine and the threats. The round trip to Spokane would take approximately six hours, and Jenkins explained that he could not return in time for work. Jenkins returned to work on January 10, 1981.

On January 11, 1981, a meeting involving a small number of miners was held at the home of Cassel "Duke" Koepke, a miner at the Republic Unit Mine. At the meeting Jenkins raised safety concerns regarding the mine. On January 14, 1981, a letter was sent to MSHA indicating that Jenkins and Koepke had been elected as representatives of the production shift miners at the mine. The letter was signed by Duke Koepke and two other miners, Jim Lindsey and Jim Montoya. On January 29, 1981, a copy of this letter was sent to Droste and Short at Day Mines. A general meeting of miners was not held to elect representatives prior to the drafting and mailing of the letter.

Jenkins was absent from work January 15 through January 25, 1981, to attend the funeral of his father. While he was gone, the sand-fill operation was completed in stope 4114 and miners John Holden and Tom Rice were assigned to begin a new mining cycle in that stope. On January 31, 1981, Jenkins' partner Vilaridi was transferred out of stope 4222 and Terry Koepke, son of Duke Koepke, was assigned as Jenkins' partner. Except for the period of his suspension discussed below, Jenkins continued to work in stope 4222 until February 17, 1981, when the mining cycle was completed.

On February 2, 1981, shift boss Tom Bradley conducted a miners' safety meeting at which various safety matters were discussed. Jenkins was the only miner who spoke up and pointed out safety matters. The following day, February 3, 1981, three petitions were circulated among the miners at the mine. One was signed by 43 miners and stated that the miners did not wish to work with Jenkins. A similar petition with 28 signatures stated that the miners did not wish to work with Duke Koepke. A third petition with 52 signatures stated that Jenkins and Koepke did not represent the miners at the Republic Unit Mine. The three petitions were delivered to mine management.

On February 4, 1981, Jenkins was informed by Short that he was suspended for an indefinite period of time because of complaints about his allegedly disruptive behavior. (Management took no action against Duke Koepke.) The following day Jenkins received a letter advising him that his suspension was without pay. On February 5, Jenkins met with Short and signed an agreement to the effect that he would improve his relationship with other employees by refraining from any dialogue concerning complaints or problems except as absolutely necessary. Jenkins was then allowed to return to work.

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On July 6, 1981, the Secretary of Labor filed this discrimination complaint on behalf of Jenkins against Day Mines. From July 22, 1981, through August 14, 1981, Jenkins was the victim of numerous acts of harassment and vandalism at the mine. These acts included the placing of human waste and other substances in Jenkins' boots and other articles of his clothing, the pouring of drill oil over his lunch bucket, and the setting up of a suggestion box asking for "ways to get rid of Sam." On July 23, 1981, Short posted a memorandum on the mine bulletin board threatening employees with discipline, up to and including discharge, for involvement in acts of harassment or vandalism. Short also instructed the two shift foremen to have meetings with miners to advise them that they would be disciplined for such acts. The shift foremen testified that they had such meetings. Following the evidentiary hearing in this case, the Commission's administrative law judge issued a decision dismissing the discrimination complaint in its entirety. The judge first examined Short's posting of Jenkins' December 25 letter, which included among its complaints references to misconduct by other miners. Jenkins argued that management's purpose in posting the letter was to identify him as a troublemaker. Jenkins asserted that the foreseeable and intended effect of the posting was to expose him to the hostility of other miners. Hecla-Day pointed out that Short had asked Jenkins several times whether he objected to the letter being posted and that Jenkins had raised no objection. Hecla-Day argued that management had a legitimate business justification for posting the letter--Short was concerned over serious allegations in the letter of alcohol use at the mine and believed he would discover whether there was any truth to them by having the letter posted. The judge found Short's explanation for posting the letter credible. The judge concluded, "[T]he evidence does not support the contention by Jenkins that posting the letter was intended to be a discriminatory act against him and such allegation is rejected." 5 FMSHRC at 499.

The judge next examined whether the failure to reassign Jenkins to stope 4114 when it became available again in January 1981 was discriminatory. Jenkins argued that it had been the usual practice in the mine to return the same mining crew to the stope they had previously worked when the sand-fill operation was completed and the stope was ready for another mining cycle. Hecla-Day contended that stope assignments were not rigid, and that Jenkins' assignment was made in accordance with the mine's existing policies. The judge found that a miner was not necessarily entitled to be returned to a stope in which he had previously worked. He also found that because Jenkins was not finished mining in stope 4222 when stope 4114 became available again, and other miners were available at that time to work in stope

4114, the assignment of the other mining team to stope 4114 accorded with the operator's normal business policies. The judge concluded that neither adverse action nor discrimination had occurred in connection with the stope assignments.

With regard to Jenkins' suspension without pay in February 1981, the judge found that Jenkins had engaged in protected activity prior to his suspension and that the suspension was motivated in part by his protected activity. The judge found, however, that Hecla-Day had affirmatively defended against Jenkins' prima facie case of discrimination. The judge concluded, "After a careful review of all the evidence and on the basis

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of the Commission's directives regarding this issue, I conclude that [the operator's] business justification for suspending Jenkins for two days was not pretextual and the reasons for doing so were both credible and plausible enough to prompt management to take this adverse action." 5 FMSHRC at 503.

Finally, the judge addressed the harassment of Jenkins that had occurred in July and August after the filing of the discrimination complaint. At the outset of the hearing, the Secretary moved to amend the complaint to include allegations that these acts constituted a continuing pattern of harassment condoned by mine officials. Although the judge denied the motion, he allowed the introduction of evidence concerning the events of July and August. The judge concluded, "I find that the evidence fails to show that [the operator] was involved directly or indirectly in any of the acts of vandalism or harassment ... inflicted on Jenkins following the filing of his complaint of discrimination." 5 FMSHRC at 504. The judge thus dismissed the discrimination complaint.

Jenkins' petition for discretionary review raises several assignments of error. His main contention is that the operator discriminated against him by posting his December 25 letter, by failing to reassign him to stope 4114 in January 1981, and by indefinitely suspending him without pay on February 4, 1981. Jenkins also asserts that the judge erred in certain evidentiary rulings and in refusing to allow amendment of his complaint to include the acts of harassment against him in July and August 1981. On review the Secretary contends only that Jenkins' suspension without pay was discriminatory. We conclude that the suspension without pay violated the Mine Act, but reject Jenkins' other assertions of error.

## II.

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the

prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1936-38 (November 1982). The ultimate burden of persuasion does not shift from the complainant. *Robinette*, 3 FMSHRC at 818 n. 20. See also *Boich v. FMSHRC* 719 F.2d 194, 195-96 (6th Cir. 1983); and *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984)(specifically approving the Commission's *Pasula-Robinette* test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. *NLRB v. Transportation Management Corp.*, U.S., 76 L.Ed. 2d 667 (1983).

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It is undisputed that Jenkins engaged in protected activities--indeed, insofar as relevant to the issues in this case, only protected activities-- during the period December 1980 through February 1981. These activities included his communication of safety complaints to management in his December 25 letter, his circulation of the petition in January complaining of the cut-off of power to the main hoist, his efforts to elect miners' representatives and to serve as one himself, and his voicing of "safety complaints at the meetings conducted at the mine on December 29, 1980, and February 2, 1981. The crucial issue in this case is whether management took adverse actions against Jenkins because of his protected activities. We turn first to the posting of his December 25 letter and the January stope assignments.

The posting of Jenkins' December 25 letter The judge ultimately found that Short's posting of Jenkins' letter was not a "discriminatory act." 5 FMSHRC at 499. The judge rested his dismissal of this portion of Jenkins' discrimination complaint on his crediting of Short's testimony concerning the business reasons for the posting. 5 FMSHRC at 498-99. Although the judge did not explicitly phrase his conclusion in terms of the Pasula- Robinette framework, it is apparent from his ultimate findings that he determined that Jenkins did not prove the second element of a prima facie case and therefore failed to establish a prima facie case. We agree. 1/

A showing that an adverse action occurred is a component of the second element of a prima facie case. In general, an adverse action is an act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment

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1/ Certain aspects of the judge's legal analysis of the letter-posting issue require clarification, although they do not affect his correct determination that Jenkins failed to establish a prima facie case. Cf. Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 996-97 n. 6 (June 1983). When viewed in the Pasula-Robinette context, the judge's ultimate finding that the posting was not a discriminatory act can only mean that he concluded there was no improper intent behind the posting. This reading of the judge's decision is reinforced by his summary of conclusions in which he stated, "Jenkins has failed to establish a case of discriminatory conduct ... in regards to [the] posting...." 5 FMSHRC at 509. Thus, in light of the judge's ultimate findings, we interpret his comment that Short's posting was, in part, "motivated" by Jenkins' protected activity (5 FMSHRC at 498) as a recognition that Jenkins' protected writing of the letter was a necessary precondition to its posting. We reject any

suggestion that partially discriminatory motivation was present as being inconsistent both with the judge's ultimate findings and conclusions, and with our own determinations on review.

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relationship. 2/ An adverse action may or may not be discriminatorily motivated. Here, however, the posting of Jenkins' letter was not a self-evident form of adverse action, like discharge or suspension. Therefore, we must examine closely the surrounding circumstances to determine the nature of this action.

Hecla-Day's explanation that the letter was posted in an effort to uncover the truth concerning Jenkins' allegations is credible. Jenkins sent this letter to management in the aftermath of a fatal accident. The letter leveled a number of serious safety complaints, for example, that drinking by some miners was a major problem at the mine and had been a contributing factor in the accident. 3/ As the judge found, there is every indication on this record that mine management was concerned by Jenkins' charges and was determined, in good faith, to ascertain whether they had any basis.

In a letter dated January 5, 1981, General Manager Droste acknowledged receipt of Jenkins' letter and stated:

The observations and accusations contained therein are of a most serious nature. I have informed Mr. Calhoun [the president of Day Mines], and am hereby advising you, that all items mentioned by you will be investigated and will be treated in a written response to you.

Res. Exh. 1. Management subsequently undertook an investigation of Jenkins' complaints. The investigation resulted in Droste's detailed letter of January 14, 1981, responding to and denying Jenkins' charges.

While this internal investigation was going on, Short met with Jenkins and Vilardi on January 7, 1981, to seek their permission to post the letter. Short testified that he asked for their permission several times, and that neither Jenkins nor Vilardi raised any objection to the posting. The judge specifically credited Short's testimony explaining his reasons for the posting:

Well, in reading the letter, of course, it brought out a lot of questions to my mind. Being in my position, I am aware that not everyone is going to

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2/ This case does not require us to develop a more of what is covered by the term adverse action. We recognize that discrimination may manifest itself in subtle or indirect forms of adverse action. See generally *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1478

(August 1982). We also borrow the apt words of the Court of Claims, writing in a related context, that an adverse action "does not mean any action which an employee does not like." *Fucik v. United States*, 655 F.2d 1089, 1096 (Ct. Cl. 1981). Determinations as to whether an adverse action was taken must be made on a case-by-case basis.

3/ The truth of Jenkins' various complaints was not specifically tried in this proceeding and is not relevant to the discrimination issues presented on review.

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talk to me with the freedom that they would someone else and so I thought that there may be a chance that the things that Sam had mentioned in his letter, there may be some truth to parts of it. I didn't actually believe that there was, but I felt that I had to find out if these allegations were true. I felt that by posting the letter that I would find out one or two things: either there was some truth to it and a group of miners either who signed the letter or who also agreed with Sam and did not sign the letter, would come forth to me on posting the letter and say, "yeah, this is true," or I would get a negative response in the sense that no one would come forward and that this would also indicate to me that there was no truth to what he was saying.  
Tr. 214-15.

Short further testified that if Jenkins had not agreed to posting the letter, he would not have done so. Short stated that he had not threatened Jenkins and that their meeting was conducted without animosity.

In attacking the judge's crediting of this testimony, Jenkins argues that the foreseeable and intended consequence of the posting was to expose him to the hostility of other miners--and, presumably, to subject him to intolerable working conditions. The posting of Jenkins' letter did provoke an "angry and threatening response by other miners. However, prior to the posting, Jenkins had secured the signatures of four other miners to his letter, had raised some of the same complaints at the December 29, 1980, safety meeting, and had circulated a petition signed by 44 miners complaining of the power cut=off to the main hoist, a subject also mentioned in his letter. Therefore, there was demonstrated support among other miners for at least some of Jenkins' complaints. We are not persuaded on this record that when Jenkins agreed to the posting, the foreseeable and unavoidable consequence--in either his contemplation or that of management was the arousal of widespread antipathy towards Jenkins. Furthermore, as the judge emphasized, "These acts by Jenkins indicate an attempt on his part to publish his views as to what he considered was wrong at the Republic Unit [Mine]." 5 FMSHRC at 499.

In summary, the judge credited Short's testimony that he posted the letter with Jenkins' uncoerced consent solely for legitimate business reasons. Jenkins has not persuaded us on review to upset this credibility resolution. In view of the foregoing considerations, we cannot treat the posting as an adverse action or a form of discrimination motivated in any part by Jenkins' protected activity.

We therefore conclude that substantial evidence supports the judge's dismissal of this aspect of Jenkins' complaint.

#### The January stope assignments

The judge's findings and credibility resolutions on this issue are straightforward, detailed, and amply supported by the evidence. 5 FMSHRC at 499-501. He concluded that the failure to reassign Jenkins to stope 4114, when it became available again after back filling in January 1981,

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was neither an adverse action nor a discriminatory act. The judge further concluded that even if partially discriminatory motivation could be inferred regarding the stope assignment, Hecla-Day affirmatively defended against a prima facie case.

The judge carefully reviewed the conflicting evidence on how stope assignments were made. He found that there was not an existing policy at the mine that expressly guaranteed permanent stope assignments to miners. He also determined that the reason Jenkins was not reassigned to stope 4114 was that he and his partner were not finished mining in stope 4222 when the assignment needed to be made, and another crew was available. The judge stated:

I find that the weight of the evidence supports [the operator's] contention that their actions in this instance were motivated by the time schedules as to the availability of miners and stopes and the requirements for continued production in the mine. Stope 4114 became available for mining on January 23, 1981 and Jenkins was not finished in 4222 until February 17, 1981 which would cause measurable loss of production if the stope was to remain idle during that time.

5 FMSHRC at 501.

The judge based these findings on his resolutions of conflicting evidence. He specifically credited the testimony of Short that production needs and the availability of miners were key factors to be weighed in making stope assignments. Short's testimony was corroborated by that of two experienced shift bosses. The judge also found reliable a detailed 41-page list of stope assignments over time (Res. Exh. 7), which bore out Short's testimony that miners did not have entitlements to permanent assignments in any particular stope.

Substantial evidence clearly supports the judge's determination that reassignment of miners to stopes they had previously worked was not guaranteed, and that production needs and the availability of miners were overriding factors in making the assignments. We have carefully reviewed the record and discern no reason to disturb the judge's findings. We affirm his conclusion that the failure to reassign Jenkins was based solely on legitimate business reasons in accord with existing policies. We also agree that even had management's actions been tainted in part by discriminatory animus, the same assignments would have been made in any event for these business reasons alone.

## The suspension of Jenkins without pay

When Jenkins was initially suspended for an indefinite period on February 4, 1981, considerable turmoil had arisen at the mine centering around Jenkins' various safety complaints and his attempts to represent miners for safety purposes. Management had just received a petition signed by 43 miners stating they were "tired of Chester (Sam) Jenkins["]

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agitating and disruptive accusations and do not wish to work with him." Pet. Exh. 4. The judge found that the suspension of Jenkins "was the culmination of various events recited earlier herein, such as, the December 25th letter, his efforts to elect miner's representatives, and safety complaints made by petition and at safety meetings." 5 FMSHRC at 502. He concluded that the suspension of Jenkins was motivated in part by the effects of his protected activity:

The evidence also shows there was animus on the part of Day Mines's management towards Jenkins because of these activities which caused tension amongst the miners, was disruptive to the operation of the mine, and reflected badly upon supervisors. From all of these circumstances, I conclude that Jenkins has established, by a preponderance of the evidence, a prima facie case under the test set forth by the Commission in Pasula-Robinette, supra.

Id (Emphasis added.) We affirm the judge's conclusion that management suspended Jenkins without pay because of his protected activity. On the facts presented in this case, however, we disagree with his further conclusion that Hecla-Day affirmatively defended against Jenkins' prima facie case.

The essence of the Pasula-Robinette affirmative defense is a showing that the adverse action would have been taken in any event wholly apart from considerations based on the miner's protected activities. As discussed below, we find no evidence that Jenkins engaged in misconduct. It also appears that less drastic alternatives were available to management for handling the situation. We cannot conclude that absent his protected activities Jenkins would have been suspended without pay.

We recognize that the asserted focus of managerial concern was on the effects of Jenkins' protected activities, not his actions themselves. A miner's exercise of protected activity may not always prove popular and may generate negative, even disruptive, reactions. However, if miners could be subjected to discipline merely because their protected activity became unpalatable to others, the exercise of protected rights could be chilled.

The judge found no misconduct on Jenkins' part. He also found that Jenkins had not "forced himself" on other miners. 5 FMSHRC at 503. The evidence supports these findings. No other miners were subjected to adverse action because of the turmoil in the mine. There was no posting of a general disciplinary notice warning against continued disruption.

If, as a matter of last resort, it was deemed necessary to take action against Jenkins, and no other miners, no reason appears why he could not have been briefly suspended without penalties and with pay. 4/ However, we are left with the

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4/ The operator permitted Jenkins to return to work after a two-day hiatus following his agreement to refrain from any discussion of complaints or problems except as absolutely necessary. Although this return to work limits the operator's back pay liability to two days, we emphasize that an operator may not condition a miner's continued employment on a pledge to refrain from activities protected by the Mine Act.

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fact that Jenkins alone was suspended without pay and suffered a financial detriment because of his protected activity. Such a result cannot be squared with the broad scope of protection afforded by section 105(c)(1) of the Mine Act. Cf. *Sioux Products, Inc. v. NLRB*, 684 F.2d 1251 1257-59 7th Cir. 1982)(the discharge of only a union supporter because of unrest stemming from protected activities held to be discriminatory). Accordingly, we reverse and remand so that the judge may make an appropriate back pay award.

Jenkins' other assertions of error

Jenkins' other assertions of error lack merit and do not require extended comment. Jenkins argues that the judge erred in refusing to allow amendment of the discrimination complaint to include the acts of harassment against him in July and August 1981. The judge nevertheless allowed the introduction of evidence on this subject, and thus afforded Jenkins the opportunity to be heard on these issues. The judge found that the operator had not been involved in these acts, and had taken steps to stop them. These findings are supported by substantial evidence and we affirm them. We have reviewed Jenkins' remaining evidentiary objections, and conclude that the judge committed no legal error or abuse of discretion in his evidentiary rulings.

### III.

For the foregoing reasons, we affirm the judge in all respects except for his conclusion that the suspension without pay did not violate the Mine Act. On that issue, we reverse and remand so that the judge may make an appropriate and expeditious back pay award.

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